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Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Public Interest Obligations	)	MM Docket No. 99-360
Of TV Broadcast Licensees	)	
	)	

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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BROADCASTERS
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Executive Summary

The National Association of Broadcasters ("NAB") submits these comments in response to the Commission's *Notice of Inquiry* ("*Notice*") seeking comment on the public interest obligations of television broadcasters as they transition to digital transmission technology. The *Notice* requested comment on four broad categories of issues: (1) the application of television stations' public interest obligations to the new capabilities of digital television ("DTV"), such as multiple channel transmission; (2) how television stations could serve their communities by providing viewers with information on their public interest activities, and using digital technology to provide emergency information in new ways; (3) how DTV broadcasters could increase access to television programming by people with disabilities, and further diversity; and (4) whether digital broadcasters could enhance the quality of political discourse through uses of the airwaves for political issues and debates.

Broadcasters are proud of their record of public service. Local stations are the primary source of news, election information, disaster warnings and other emergency information, and information about community affairs for the overwhelming majority of Americans. The President's Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters did not identify any area in which the public believed that broadcasters provided inadequate public service. NAB's 1998 study, cited by the Commission, revealed that broadcasters provided $6.85 billion in public service activities in 1996. Thus, there is no predicate for determining that new public service requirements are needed.

In addressing the various issues raised in the *Notice*, NAB first identifies a number of general themes that should inform the Commission's approach as it seeks to define the public interest obligations of television broadcasters in a digital environment:

■ The Commission should refrain from prematurely establishing public interest obligations for digital services that have yet to be developed.

■ The mere use of digital, as opposed to analog, transmission technology does not warrant the adoption of new and expanded public interest obligations. In particular, the transition to DTV does not justify the imposition of expanded public interest duties that are not reasonably germane to digital broadcasting or technology.

■ As recognized by Congress in the Telecommunications Act of 1996 ("1996 Act"), convergence in telecommunications technology should be accompanied by convergence in regulatory treatment. Thus, the Commission should not impose unequal burdens on different types of licensees, if they are competing in the same markets by offering the same services.

■ The extraction of additional public interest concessions from DTV broadcasters on the basis of a *quid pro quo* is unjustified. There is no basis for imposing new and expansive public interest obligations as a form of payment for the mere temporary loan of additional spectrum during the digital conversion, especially in light of Congress' intent in the 1996 Act to preserve free television and promote the competitiveness of over-the-air broadcast stations.

■ In light of the significant public interest obligations already imposed on broadcasters, additional public interest duties can be justified only if the evidence demonstrates that the existing standards are inadequate, and that the benefits of any new obligations outweigh their costs.

■ In an era of tremendous growth in the number and variety of media outlets, the Commission should avoid inflexible regulation and rely primarily on marketplace forces when considering any new public interest obligations for DTV broadcasters.

■ The "scarcity doctrine" that has traditionally been used to justify affording lesser constitutional protection to the broadcast media is now regarded by many jurists and legal scholars as logically and factually deficient. The Commission must therefore be cautious in imposing new public interest obligations on broadcasters that implicate the First Amendment, as the Commission may be unable to rely on the traditional basis for establishing the constitutionality of any such obligations.

With these general precepts in mind, NAB argues that a number of the specific proposals in the *Notice* are premature, unrelated to digital broadcasting, unduly burdensome, lacking in evidentiary support or constitutionally suspect.

In considering how public interest programming duties should apply to a multicasting broadcaster, NAB asserts that it would be inappropriate to impose the full panoply of public interest obligations on all of the program streams that a multicasting broadcaster might offer

(particularly if such program streams are highly specialized, rather than general interest). But NAB points out that DTV broadcasters may ultimately choose not to multicast at all, but instead decide to broadcast primarily one high definition television signal, in which case broadcasters' existing programming-related public interest duties should not be altered. Given the entirely speculative nature of any multicasting services at this time, NAB advises the Commission to refrain from adopting special public interest obligations on multicasting, until such services actually develop.

In addition to multicasting, DTV broadcasters may also provide ancillary or supplementary services (such as Internet access or datacasting) that are not free over-the-air services. Because Congress generally intended to end the differentiated legal treatment of converging technologies in the 1996 Act, NAB believes that any ancillary or supplementary services offered by DTV broadcasters should be subject to the same public interest obligations as comparable services offered by non-broadcasters. Thus, if a DTV broadcaster were to offer an Internet access service, the public interest obligations applicable to that service should be comparable to those applied to any other licensee's Internet access service, even if a non-broadcaster. The terms of Section 336 of the Communications Act clearly support this position.

With regard to proposals for requiring additional disclosures in DTV stations' public files or requiring the posting of public files on the Internet, NAB sees no logical connection between broadcasters' disclosure obligations and their transmission of a digital, rather than an analog, signal. The *Notice* also cited no evidence tending to show that the existing disclosure obligations of television broadcasters are in any way inadequate or ineffective. The suggestion in the *Notice* to require DTV broadcasters to ascertain their community needs by certain specified means

should not be considered for the same reasons that the Commission previously eliminated similar ascertainment requirements in the 1980's.

Other proposals set forth in the *Notice* (including access to broadcast programming for persons with disabilities, the promotion of diversity in broadcasting, and the provision of enhanced disaster warnings) are either unrelated to digital technology or more appropriately addressed in other Commission proceedings. NAB further emphasizes that implementation of suggestions in the *Notice* concerning disability access and enhanced emergency warnings will depend on the manufacture of DTV receivers that can receive and decode the additional information that broadcasters might send in their DTV signals.

In addressing suggestions that the Commission should establish detailed public interest standards with numerical quotas, NAB contends that such proposals reflect an outdated model of regulation that is particularly inappropriate for the digital age. Given the competitive nature of the video programming marketplace and the available evidence regarding broadcaster performance, inflexible numerical public interest requirements are clearly unnecessary. Public interest standards with numerical quotas also improperly encroach on the editorial discretion of licensees.

The *Notice* additionally discussed ways the Commission could promote voluntary efforts by television broadcasters to enhance the political debate, and offered proposals to encourage or require broadcast licensees to provide free air time to candidates. NAB contends that, whether voluntary or mandatory, free air time proposals have no connection to digital broadcasting, are unlikely to be effective in improving the quality of political discourse, and are not needed to ensure the broadcast of fully sufficient amounts of political and campaign-related information. In light of the detailed *statutory* provisions establishing a system of political broadcasting based

on the purchase by candidates of air time at discounted rates, the Commission lacks the authority to adopt inconsistent rules requiring the provision of free time by DTV broadcasters. Given the logical and empirical deficiencies of the scarcity doctrine, a requirement for broadcast licensees to provide free air time to candidates would also be contrary to the First Amendment. Indeed, even under case law affording broadcasters a lesser degree of constitutional protection due to the presumed scarcity of spectrum, NAB believes that a free time mandate would be found unconstitutional, as treading unnecessarily on the editorial discretion of broadcast licensees.

In sum, nothing inherent in digital technology requires a different or more expansive public interest analysis than that currently applied to analog television broadcasters. NAB accordingly believes that DTV broadcasters should be afforded the discretion to develop and offer innovative programming and other services they believe will best meet the needs of the communities they serve.

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TO: The Commission

COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")[1] submits these comments in response to the Commission's *Notice of Inquiry* in this proceeding.[2] The *Notice* sought comment on the public interest obligations of television broadcasters as they transition to digital transmission technology. In adopting the *Notice*, the Commission emphasized that it was not proposing new rules or policies, but rather creating a forum for public debate on how broadcasters can best serve the public interest during and after the digital transition. Specifically, the Commission asked for comment on four broad categories of issues:

(1) the application of television stations' public interest obligations to the new capabilities of digital television ("DTV"), such as multiple channel transmission;

(2) how television stations could serve their communities by providing viewers with information on their public interest activities, and using digital technology to provide emergency information in new ways;

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[1] NAB is a nonprofit, incorporated association of television and radio stations and broadcast networks which serves and represents the American broadcast industry.

[2] *Notice of Inquiry* in MM Docket No. 99-360, FCC 99-390 (rel. Dec. 20, 1999) ("*Notice*").

(3) how DTV broadcasters could increase access to television programming by people with disabilities, and further diversity; and

(4) whether digital broadcasters could enhance the quality of political discourse through uses of the airwaves for political issues and debate.

In addressing these various issues, NAB first identifies a number of general themes that should inform the Commission's approach as it seeks to define the public interest obligations of television broadcasters in a digital environment. With these general precepts in mind, NAB then addresses the specific categories of issues raised by the Commission.

I. THE COMMISSION'S CONSIDERATION OF THE PUBLIC INTEREST OBLIGATIONS OF TELEVISION BROADCASTERS IN THE DIGITAL AGE SHOULD REFLECT SEVERAL GENERAL PRECEPTS.

A. The Premature Imposition of Public Interest Obligations on Undeveloped Digital Services Should Be Avoided.

While digital technology will undoubtedly bring both new opportunities and challenges to television broadcasters, NAB emphasizes that the broadcast industry is only at the preliminary stage of the digital transition. It remains unclear how broadcasters will actually use their digital channels, and the choices are many. Digital broadcasters must decide whether to transmit high definition television ("HDTV") programming, multicast, datacast, or to offer some combination of these. Given the basic uncertainties as to the form that the new digital services will take, NAB believes it would be premature to establish public interest obligations for services that have yet to develop. Indeed, rules based only on speculative assumptions about the possible uses of DTV channels could, in the end, be completely inappropriate for the digital services that eventually emerge in the marketplace.

For these reasons, NAB strongly believes that rules pertaining to the public interest obligations of DTV broadcasters should not be adopted until digital services have been allowed to develop more fully. Rather than prematurely adopting such rules, the Commission should at this time be more concerned with insuring a successful and expeditious digital transition. As NAB has previously argued, the Commission can significantly contribute to the success and speed of the DTV transition by acting promptly on other matters relating to DTV. In particular, the Commission must act to adopt must carry regulations for DTV signals.[3] The Commission can additionally encourage the transition to digital broadcasting by implementing technical standards for making digital televisions compatible with cable systems.[4] Without Commission action on these two vital issues, the transition to DTV will be significantly impeded, and such delay will not serve the public interest.[5] Thus, NAB reminds the Commission that, before television broadcasters can fulfill any public interest obligations on their DTV channels, digital services must in fact have been given an opportunity to develop and flourish in the marketplace.[6]

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[3] As NAB explained in response to the Commission's *Notice of Proposed Rulemaking* on digital must carry, a timely and successful DTV transition cannot be achieved without the adoption of must carry rules insuring consumer access to all DTV broadcasts. *See* Comments of NAB in CS Docket No. 98-120 at 9-24 (filed Oct. 13, 1998).

[4] NAB has continually expressed its frustration with the inability of the cable industry and receiver manufacturers to reach agreement on interoperability issues. *See* Letter re CS Docket No. 98-120 from NAB, MSTV and ALTV to Chairman Kennard (Feb. 22, 2000). The Commission recently sought comment on a number of issues pertaining to the DTV transition, including cable compatibility and DTV receiver standards. *See Notice of Proposed Rulemaking* in MM Docket No. 00-39, FCC 00-83 (rel. March 8, 2000).

[5] *See Fifth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd 12809, 12812 (1997) ("it is desirable to encourage broadcasters to offer digital television as soon as possible," given the "intense competition in video programming").

[6] As NAB noted in another proceeding, delay in the DTV transition will also frustrate the development of new wireless services on spectrum located in the 700 MHz bands (*i.e.*, reallocated television channels 60-69). *See* NAB Petition for Partial Reconsideration in WT Docket No. 99-168 (filed Feb. 22, 2000).

B. The Transition to Digital Transmission Technology Does Not Automatically Justify the Imposition of New Public Interest Duties, Particularly Those Not Reasonably Germane to Digital Broadcasting or Technology.

NAB also questions whether a shift in technology justifies the imposition of altered or new public interest duties generally. We do not believe, as the *Notice* seems to imply, that the mere use of digital transmission technology warrants the adoption of new and expanded public interest obligations. Other communications services have converted to digital technology without having to accept new public service obligations (or return spectrum or pay fees.)[7] Moreover, DTV could ultimately resemble television today, with most broadcasters providing viewers with one HDTV signal. If so, there would be no basis for altering broadcasters' existing public interest duties, which are currently based on the delivery of a single, free over-the-air television signal. Even the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters ("Advisory Committee") agreed that, if broadcasters used their digital spectrum primarily for a single HDTV signal, the rationale for increased public interest obligations "would be diminished."[8]

More particularly, NAB asserts that the transition to DTV does not justify the imposition of any revised or new public interest duties for DTV that are not reasonably germane to digital broadcasting or technology.[9] As discussed in detail below, a number of the proposals in the

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[7] For example, cellular telephone licensees, many of whose channels were originally assigned by lottery rather than competitive bidding, are converting (or have already converted) from analog to digital technology. Although this conversion will result in up to an eight-fold increase in system capacity, these cellular licensees will not pay any fees, return any spectrum, or incur any other obligations due to their digital conversion.

[8] Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, Final Report at 54 (Dec. 1998) ("Advisory Committee Report").

[9] After all, any Commission rule must bear some logical relationship to the underlying regulatory issue the rule purports to address. *See, e.g., ALLTEL Corporation v. FCC*, 838 F.2d 551, 559

Notice lack a reasonably direct relationship to DTV. Indeed, some of the proposals only incidentally relate to broadcasting *in any form*, but are in essence efforts to commandeer broadcasters to address perceived societal problems. NAB generally objects to the placement of burdens on broadcasters to pursue goals not directly related to broadcasting, and, in the context of this proceeding, specifically objects to the imposition of new public interest obligations for DTV broadcasters that lack a direct relationship to digital broadcasting.

C. Convergence in Telecommunications Technology Should Be Accompanied by Convergence in Regulatory Treatment.

For the past several years, communication technologies and services that were once regarded as separate have gradually converged.[10] The implementation of digital technology will only hasten this convergence, as, for example, it will allow broadcasters to transmit data, offer Internet access, and/or provide a multichannel video service. Convergence therefore promises increased competition between traditionally distinct service providers.

This technological convergence was, moreover, the impetus behind the Telecommunications Act of 1996 ("1996 Act"), which Congress primarily designed to end the legal barriers between various communications technologies and industries.[11] Because Congress

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(D.C. Cir. 1988) (court found a Commission rule affecting the determination of certain costs of local exchange carriers to be arbitrary and capricious, because Commission's decision had "no relationship to the underlying regulatory problem").

[10] Convergence has been defined as the "combination of both new and existing media – e.g., broadcasting, cable, fiber optics, satellites – into one integrated system for delivery of video, voice, and data." Meyerson, *Ideas of the Marketplace: A Guide to The 1996 Telecommunications Act*, 49 Fed. Com. L. J. 251, 252 (1997), *quoting* Botein, *Antitrust Issues in the Telecommunications and Software Industries*, 25 Sw. U.L. Rev. 569, 569 (1996).

[11] For example, the 1996 Act lifted the legal barriers both to telephone company provision of cable and other video programming, and cable entry into the local telephone market. While local telephone companies were also permitted into the long distance telephone business, they were forced to open their markets for local service.

intended in the 1996 Act to end the "legal balkanization" that stood "in the path of technological convergence,"[12] the Commission's regulatory treatment of formerly disparate communications technologies should also converge as the technologies converge.

In particular, NAB believes that the Commission should not impose unequal burdens on different types of licensees, especially if they are competing in the same markets by offering the same services. The type of service offered by a licensee should determine the level of public interest obligations imposed, rather than the identity of the licensee. Thus, as discussed in greater detail below, if a broadcaster were to offer a data service, the public interest duties imposed on that broadcaster's service should be comparable to the obligations imposed on any other licensee's data service. The mere fact that a licensee may be a "broadcaster" does not automatically justify the imposition of greater public interest duties than those imposed on a non-broadcast licensee, if both licensees are providing similar services.

D. Extracting Additional Public Interest Concessions from DTV Broadcasters on the Basis of a *Quid Pro Quo* Is Unjustified.

A number of the proposals in the *Notice* appear based on the erroneous assumption that broadcasters were given valuable spectrum for free and that, in return, they should be made to pay in the form of new public interest obligations. NAB contends that the extraction of additional public interest concessions from DTV broadcasters cannot be justified on this *quid pro quo* theory.

As an initial matter, imposing payment for the digital channels in the form of expanded public interest duties seems contrary to the intent of Congress. In the 1996 Act, Congress had

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[12] Krattenmaker, *The Telecommunications Act of 1996*, 49 Fed. Com. L. J. 1, 9 (1996). *See also* Meyerson, *Ideas of the Marketplace* at 252-53 (1996 Act envisioned a flexible, competitive and diverse telecommunications marketplace, which was to be made possible by convergence of technology).

the option of requiring broadcasters to pay for digital spectrum but declined to do so, evidently to "preserve and to promote the competitiveness of over-the-air broadcast stations."[13] Given this Congressional intent, the Commission should refrain from extracting payment under the guise of new and expansive public interest obligations.

In any event, NAB disputes the supposition that the grant of digital spectrum to broadcasters represents a "windfall" for which broadcasters must be made to pay in one form or another. As explained in detail below, digital television will not benefit broadcasters to such a greater extent than their analog channels that some additional recompense should be required.

First, DTV channels have not been awarded to broadcasters in perpetuity, but have merely been loaned for the length of the public's transition from analog to digital reception. As consumers adopt digital technology, broadcasters will return one channel, leaving them with the same six MHz assignment they now possess.[14] No other communications service that has adopted digital technology has returned even one MHz of spectrum.

Beyond returning valuable spectrum to the government, broadcasters will invest approximately $10-$15 billion (about $8-$12 million per station) in the equipment needed to convert their commercial stations to digital. Additional amounts will be needed to similarly convert noncommercial stations. And broadcasters will be required to invest these large sums, even though the additional revenue potential to be derived from digital broadcasting remains

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[13] H.R. Rep. No. 204, 104th Cong., 2d Sess. 48 (1995) (House Commerce Committee report on the 1996 Act).

[14] *See* 47 U.S.C. §§ 336(c); 309(j)(14). Moreover, defining the "core" DTV spectrum as including channels 2-51 will, at the end of the digital transition, permit recovery by the government of 108 MHz of spectrum – more than one fourth of the total spectrum used for broadcast television today. This spectrum will ultimately be auctioned and used by other services. *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order* in MM Docket No. 87-268, 13 FCC Rcd 7418 at ¶ 45 (1998).

unclear.[15] Despite incurring these additional costs, with no promise of commensurate additional revenues, broadcasters are required to provide on their digital channel *free*, over-the-air television service, an obligation that is not now placed on analog television stations.[16] Given these factors, it is not surprising that an independent market research firm has concluded that, at the conclusion of the digital transition, broadcasters will have invested billions and lost market share from their present position.[17] Rather than expecting to receive a windfall from digital television, broadcasters in fact feel they must convert to digital technology to merely remain competitive in a video marketplace where all of their competitors will be digital.

Thus, no evidence exists that the grant of digital channels to broadcasters represents a giveaway or any form of unjust enrichment. Accordingly, there is no basis for imposing new and expansive public interest obligations as a *quid pro quo* for the temporary receipt of additional spectrum during the digital conversion, especially in light of Congress' intent to preserve free television and to "promote the competitiveness of over-the-air broadcast stations." H.R. Rep. No. 204, 104th Cong., 2d Sess. 48 (1995).

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[15] There is certainly no reason to expect advertisers to pay more for advertisements on a digital or HDTV signal, simply because it is not analog. In addition, advertiser-supported multicasting might only divide (rather than increase) a station's audience, thus providing no additional revenues. *See* discussion in Section II.A. below.

[16] Specifically, "broadcasters must provide a free digital video programming service the resolution of which is comparable to or better than that of today's service and aired during the same time periods that their analog channel is broadcasting." *Fifth Report and Order*, 12 FCC Rcd at 12820. If broadcasters do choose to provide subscription ancillary or supplementary services in addition to a free, over-the-air television signal, then they must pay significant fees. *See* 47 U.S.C. § 336(e) and the discussion in Section II.C. below.

[17] *See* Testimony of Josh Bernoff, Principal Analyst at Forrester Research, to Advisory Committee (Jan. 16, 1998).

E. Additional Public Interest Duties on Broadcasters Cannot Be Justified Unless the Evidence Demonstrates that the Existing Public Interest Standards Are Inadequate and that the Benefits of New Obligations Clearly Outweigh their Costs.

It is axiomatic that any Commission regulation must be supported by an adequate factual basis.[18] In light of the significant public interest obligations already imposed on broadcasters, additional public interest duties on analog or digital broadcasters can be justified only if the evidence demonstrates that these existing standards are inadequate and that the new duties would address these inadequacies.[19] As discussed in more detail below, the *Notice* makes numerous suggestions for revising or increasing the public interest duties of DTV broadcasters, but it contains scant evidence that the existing public interest standards are inadequate or that broadcasters are currently failing to serve the public interest. Rather, the evidence shows that broadcasters take their public service obligations very seriously indeed, and provide literally billions of dollars in community service. As set forth in NAB's 1998 report, the nation's broadcasters provided $6.85 billion in community service in 1996.[20]

Beyond needing to establish an evidentiary basis of the inadequacies of existing public interest standards, the Commission must also, to justify the adoption of increased obligations,

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[18] *See, e.g., Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 763 (6th Cir. 1995) (court concluded that rules restricting cellular providers from participating in certain spectrum auctions were arbitrary, because Commission had no factual support for them).

[19] *See, e.g., ALLTEL Corp.*, 838 F.2d at 560 (FCC's "facially plausible" claim that its rule on the costs of local exchange carriers prevented certain abuses ultimately failed to justify the rule because there was "no showing that such abuse" did in fact exist and "no showing that the rule target[ed] companies engaged in such abuse").

[20] This figure included $4.6 billion in donated air time for public service announcements, $2.1 billion raised for charities and causes by stations, and $148.4 million in free air time donated for candidate debates and forums. *See* NAB, *Broadcasters, Bringing Community Service Home: A National Report on the Broadcast Industry's Community Service* at 2 (April 1998) ("NAB Report"). The *Notice* (at ¶ 8) cites the NAB Report, acknowledging that "many broadcasters have served the public interest in numerous ways over the years."

demonstrate that the benefits of any new public interest duties outweigh the costs. While the *Notice* contains a veritable laundry list of obligations that conceivably could be required of broadcasters,[21] the *Notice* often fails to recognize that imposition of these proposals would entail very significant costs on broadcasters. As an initial matter, NAB does not believe that broadcasters should be required to bear the costs of funding such a wide variety of general public benefits, particularly (as discussed above) those relating to goals only tangentially connected to broadcasting. At the very least, the Commission should realistically assess the relative costs and benefits of its public interest proposals. And unless the Commission can show that the benefits generated by its proposals are sufficient to justify the costs imposed on broadcasters, then the Commission must refrain from imposing these additional public interest obligations.

F. In Considering Any Public Interest Obligations for DTV Broadcasters, the Commission Should Eschew Inflexible Regulation and Rely Primarily on Marketplace Forces.

NAB observes that several proposals in the *Notice* reflect an outmoded regulatory mindset. Indeed, certain proposals appear to suggest the virtual reinstatement of specific past policies, such as ascertainment, that the Commission has previously found unjustifiable and consequently eliminated.

NAB believes the Commission should resist calls to return to outdated regulatory models and policies. Such traditional approaches generally tend to rely on inflexible government regulations, and can prevent licensees from adapting to future marketplace developments or even

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[21] For example, broadcasters might be forced to provide datacasting to schools and libraries; increase the types of information included in their public files; use the Internet to interact with the public and discuss their programming with members of the public; bear mandatory minimum public interest requirements; and provide free time to political candidates.

generate counterproductive incentives for broadcasters.[22] Moreover, a return to old-fashioned regulatory policies would be contrary to the Commission's general approach for more than two decades of reducing regulatory burdens no longer appropriate to changing broadcast marketplace conditions, and relying more on market incentives to accomplish regulatory goals.[23] Particularly in an era of tremendous "growth in the number and variety of media outlets,"[24] NAB sees no basis for rejecting a general market-based regulatory approach and returning to less flexible and anachronistic regulatory policies.

G. Given the Deficiencies of the Scarcity Doctrine, the Constitutional Implications of Any Proposed Public Interest Obligations Must Be Carefully Considered.

The disparate treatment of the print and electronic media under federal regulation and the First Amendment has traditionally been justified on the grounds that broadcast frequencies are uniquely scarce. Specifically, the "scarcity doctrine" has been utilized to justify greater governmental control over, and the imposition of regulations on, broadcasters than could constitutionally be asserted over newspapers and other print media.[25] Along with a great many

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[22] *See, e.g.,* Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 Colum. L. Rev. 905, 938 (1997); Hazlett and Sosa, *Was the Fairness Doctrine a "Chilling Effect"?*, 26 J. Legal Stud. 279, 292-99 (1997) (the supply of informational programming formats (news, talk, news/talk, and public affairs) in the AM and FM radio markets exploded both absolutely, and as a proportion of all formats, after abolishment of the Fairness Doctrine in 1987, thereby indicating that the doctrine had acted as a disincentive to the airing of potentially controversial speech).

[23] The Commission began to reform many of its programming related broadcast regulations well over twenty years ago. *See, e.g., Further Notice of Inquiry and Notice of Proposed Rulemaking* in Docket No. 19715, 53 FCC 2d 3 (1975) (establishing experimental exemption from formal ascertainment requirements for small market radio and television license renewal applicants); *Notice of Inquiry and Proposed Rulemaking* in BC Docket No. 79-219, 73 FCC 2d 457 (1979) (setting forth various proposals for substantially deregulating commercial radio industry).

[24] *Report and Order* in MM Docket Nos. 91-221 and 87-8, FCC 99-209 at ¶ 1 (1999).

[25] *See, e.g., Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969) (upholding constitutionality of Fairness Doctrine).

jurists and scholars, NAB believes that this "scarcity doctrine" is illogical and factually unsupportable, and therefore deficient as a legal basis for depriving broadcasters of full First Amendment protection. Thus, the Commission must be cautious in imposing new public interest obligations on broadcasters that implicate the First Amendment, as the Commission may be unable to rely on the traditional basis for establishing the constitutionality of any such obligations.

As numerous jurists and commentators have pointed out, broadcast frequencies are not uniquely scarce.[26] All economic goods are scarce, including the materials necessary for the production of newspapers. Yet the print media, unlike broadcasters, have not been subject to regulatory schemes that intrude into First Amendment territory. Since scarcity is a universal fact, it cannot be the basis for justifying regulation in one context but not in another. As the Commission itself has recognized:

> All goods, however, are ultimately scarce, and there must be a system through which to allocate their use. . . . Whatever the method of allocation, there is not any logical connection between the method of allocation for a particular good and the level of constitutional protection afforded to the uses of that good.[27]

Even beyond the illogic of the scarcity argument in the economic sense, it is clear that broadcast and other media outlets are much less scarce in a numerical sense today than in 1969 when the Supreme Court gave definition to the scarcity doctrine in *Red Lion*. Not only has the

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[26] *See, e.g., Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 508-9 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987); *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 728 n.2 (1997) (Williams, J., dissenting from denial of rehearing *en banc*); *Action for Children's Television v. FCC*, 58 F.3d 654, 675 (D.C. Cir. 1995) (Edwards, C.J., dissenting), *cert. denied*, 516 U.S. 1043 (1996); Hazlett, *Physical Scarcity* at 910.

[27] *In re Syracuse Peace Council*, 2 FCC Rcd 5043, 5055 (1987) (concluding that Fairness Doctrine violated First Amendment and did not serve the public interest), *affirmed, Syracuse Peace Council v. FCC,* 867 F.2d 654, 683 (D.C. Cir. 1989) (Starr, J. concurring), *cert. denied,* 493 U.S. 1019 (1990) ("spectrum scarcity, without more, does not necessarily justify regulatory schemes which intrude into First Amendment territory").

number of broadcast facilities exploded,[28] but the vast increase in the number and variety of nonbroadcast outlets (including cable, Direct Broadcast Satellite and the Internet) makes the idea of "scarcity" of media voices seem almost quaint. This expansion in the number and variety of media outlets should increase further as technology continues to improve, which will permit more efficient use of spectrum. Indeed, the transition to digital broadcasting should lead to even greater abundance of broadcast channels and program options. Thus, NAB agrees with the Commission when it previously concluded that "there is no longer a scarcity in the number of broadcast outlets" available to the public.[29]

If, as the Commission explicitly recognized in *Syracuse Peace Council*, the scarcity doctrine is no longer logically or empirically valid, then the Commission must be cautious in relying on *Red Lion* and its jurisprudential progeny to justify the imposition of any new public interest obligations that implicate the First Amendment. *Red Lion*'s factual predicate is clearly the scarcity of broadcast frequencies. *See* 395 U.S. at 390, 398-99 n.25, n.26, 400.[30] In the absence of such a predicate, the rationale for upholding government regulations implicating the

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[28] The number of television, AM, and FM stations has increased by 85% since 1970. *See Report and Order* in MM Docket Nos. 91-221 and 87-8, FCC 99-209 at ¶ 29 (1999).

[29] *Syracuse Peace Council*, 2 FCC Rcd at 5054. Numerous jurists and scholars have also expressed agreement with this assessment. *See, e.g., Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998); *Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1443 (8th Cir. 1993) (concurring opinion); *Telecommunications Research and Action Center*, 801 F.2d at 508 n.4; Hazlett, *Physical Scarcity* at 911; Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 Duke L. J. 899, 904 (1998).

[30] *See also FCC v. League of Women Voters of California*, 468 U.S. 364, 377 (1984); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 101 (1973) (cases similarly relying on spectrum scarcity as the basis for less First Amendment protection of broadcasting).

First Amendment rights of broadcasters becomes at best unclear.[31] Given this questionable status of the traditional approach for evaluating the constitutional implications of broadcast regulations, the Commission should exercise restraint in adopting new public interest obligations that raise clear First Amendment concerns.

II. A NUMBER OF THE SPECIFIC PROPOSALS SET FORTH IN THE *NOTICE* ARE PREMATURE, UNRELATED TO DIGITAL BROADCASTING, UNDULY BURDENSOME, LACKING IN EVIDENTIARY SUPPORT OR CONSTITUTIONALLY SUSPECT.

A. The Imposition of Public Interest Rules Pertaining to Multicasting Would Be Premature.

In establishing the statutory framework for the transition to DTV, Congress made clear in Section 336 of the Communications Act that television broadcast stations in the digital environment remain obligated "to serve the public interest, convenience, and necessity." 47 U.S.C. § 336(d). In implementing Section 336, the Commission put broadcast licensees on notice "that existing public interest requirements continue to apply" to them.[32] These public interest requirements have traditionally been applied to broadcasters providing a single analog signal carrying one video program. It remains unclear how these public interest programming duties should apply in a digital environment, where broadcasters will have the ability to multicast

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[31] Indeed, the Supreme Court has clearly suggested that it might "reconsider" its "longstanding approach" to evaluating the constitutionality of broadcast regulations, if Congress or the Commission "signal[ed] . . . that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." *League of Women Voters*, 468 U.S. at 376 n.11.

[32] *Fifth Report and Order*, 12 FCC Rcd at 12830. Thus, DTV broadcasters must, for example, air programming responsive to their communities of license, comply with the statutory requirements concerning political advertising and candidate access, and provide children's educational programming.

(*i.e.*, broadcast several video programming streams on a single digital channel). The *Notice* (at ¶ 11) requested comment on this issue.

The basic question with regard to multicasting is whether a licensee's public interest obligations attach to the DTV channel as a whole, or instead to each program stream offered by the licensee. *See Notice* at ¶ 11. NAB thinks it would be inappropriate to impose the full panoply of public interest obligations on all of the program streams that a multicasting broadcaster might offer. In particular, the full range of generalized public interest obligations should not be required on the specialized program streams that a broadcaster might offer.[33] NAB realizes, however, that the Commission may be reluctant to allow all public interest related programming to be placed on a single stream of a multicasting broadcaster, especially if the broadcaster is offering several general interest programming streams.

In considering these various factors, the Commission should recognize that, if multicasting does increase the total number of programming options available to viewers, then it becomes less necessary for each programming stream to carry all types of public interest programming. In a diverse multicasting environment, viewers will benefit from the increased number and variety of programming offerings across the market, and the Commission should be less concerned with insuring that every single programming stream offers every category of programming.[34] Due to the increase in diversity of program offerings in a multicasting

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[33] For example, it would make little sense to require a broadcaster to air children's programming on a specialized stream devoted to business news. Conversely, if a broadcaster were to offer a specialized children's programming stream, then that broadcaster should not be required to carry children's programming on all of its other programming streams.

[34] In previously eliminating quantitative programming guidelines for both television and radio stations, the Commission similarly recognized that audiences benefited by an increased diversity of program offerings across the market and that individual stations did not necessarily need to present programming of all types. *See Report and Order* in MM Docket No. 83-670, 98 FCC 2d

environment, regulations requiring every programming stream of a broadcaster to carry all types of public interest programs would appear unnecessary. Indeed, such inflexible regulations could discourage broadcasters from engaging in innovative multicasting services.[35]

With regard to Section 336(d), about which the Commission specifically inquired, NAB is not persuaded that this language directly pertains to multicasting.[36] Rather, this language applies on its face to licensees providing ancillary or supplementary services. Such a licensee seeking renewal needs to establish that its program services are in the public interest, and that its non-program ancillary and supplementary services are conducted in accordance with the rules applicable to those services. Thus, this section most directly addresses DTV broadcasters who offer both program services and non-program ancillary services, and does not provide any clear guidance as to how existing program-related public interest obligations should be applied to licensees who multicast multiple program services.

In any event, this discussion of the application of public interest duties to multicast programs remains entirely theoretical at this time. Broadcasters may ultimately choose not to multicast at all, but instead decide to broadcast primarily one HDTV signal, in which case broadcasters' existing public interest duties should not be altered. *See* Section I.B. above.

1076, 1087-88 (1984); *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1434 (D.C. Cir. 1983).

[35] For example, a broadcaster considering whether to engage in multicasting (or whether to use its digital spectrum in some other manner) might be reluctant to offer three, four or five programming streams, if that tripled, quadrupled or quintupled its public interest programming requirements.

[36] The language at issue provides: "In the Commission's review of any application for renewal of a broadcast license for a television station that *provides ancillary or supplementary services*, the television licensee shall establish that all of its program services on the existing or advanced television spectrum are in the public interest. Any violation of the Commission rules applicable to ancillary or supplementary services shall reflect upon the licensee's qualifications for renewal of its license." 47 U.S.C. § 336(d) (emphasis added).